NO. 49176-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LOUIS JOE LASACK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 15-1-03183-1

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court soundly exercise its discretion by denying defendant's request for an uncontrollable circumstances jury instruction since the elements of that affirmative defense to bail jumping were not factually supported by his claim car trouble prevented him from appearing in court as ordered?

2. Should a ruling on costs await submission of a bill?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant with second degree robbery (Ct I) and 2 counts of bail jumping (Ct II and Ct III). CP 16-7. Defendant successfully moved to dismiss the bail jump charged as Count II based on the failure of a material witness to appear. 2RP 179, 182. Defendant elected to testify. 2RP 183-98. He proposed an uncontrollable circumstances affirmative defense instruction for Count III, claiming car trouble caused him to miss court. 2RP 187, 200. The trial court did not find that to be sufficient:

> There is a legal standard you have to meet in that instruction [] and by definition uncontrollable circumstance is an act of nature such as flood, earthquake, fire or a medical condition that requires immediate hospitalization or treatment or an act of man such as automobile accidents or threats of death, forcible sexual attack, substantial bodily injury in the immediate future which there is no time for a complaint to the authorities, and no time or opportunity to resort to the courts.

> So I don't think you just automatically get that instruction for the alleged defense without meeting the legal standard set forth. [T]here is no testimony presented that any of those contemplated circumstances would have existed, so I don't think you get the instruction []. Ultimately, it's up to the state to prove that he committed the act of bail jumping and [] the elements of that were proved [] beyond a reasonable doubt. So it still doesn't change the burden. I don't think it would be appropriate to give the defense the instruction when there is no factual basis that would support it.
>
> Having ridden[1] the number one bus on many occasions and knowing [] it goes down Pacific Avenue to the area [] defendant described, it certainly is not an uncontrollable circumstance that would require him to walk 11 miles when there is a bus route just within blocks of where he lives.

2RP 200-01.

Defendant was convicted of the robbery and bail jump. CP 52, 54, 61; 3RP 246-7. A 6 month sentence was imposed for the robbery and a 1 month concurrent sentence was imposed for the bail jump. CP 65; 4RP 259. The trial court waived all discretionary LFOs and imposed mandatory LFOs totaling $800. *Id.* Defendant's notice of appeal was timely filed. CP 73.

[1] ER 201—Judicial Notice of Adjudicative Facts. "[] (b) A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned. (c) [] A court may take judicial notice, whether requested or not. [] (f) [] Judicial notice may be taken at any stage of the proceeding."

2. Facts

On August 13th, 2015, Walmart security officer Robin Alexander observed defendant hide caulking tubes and a paintbrush in the pockets of his pants. 2RP 68, 71. Alexander watched him walk out of the store without paying. 2RP 72. Alexander confronted him in the parking lot and asked him to return the stolen items. 2RP 74-5. Defendant raised his large flashlight in a threatening manner toward Alexander, then tried to flee before being apprehended. 2RP 74-7; 2RP 78, 80, 146-9.

Defendant made bail after arraignment. He was under order to return to court at the Tacoma County City Building December 29, 2015. 2RP 100-2; Ex. 8, 13. Defendant failed to appear. 2RP 105-6. The court issued a warrant for his arrest. 2RP 106; Ex. 10, 11, 12. At trial, he claimed to be unable to appear because his car's radiator "blew up" near his home in Spanaway. 2RP 187-8. That testimony revealed he lived a few blocks from Pierce Transit bus route 1, which connects near the courthouse. 2RP 188, 197-8, 201. He had gas money that could have been repurposed for bus fare, the assistance of family with a car, and remained within walking distance of the courthouse, but stayed at home for 7 days until arrested. RP 187, 197-98.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION WHEN IT DECLINED TO INSTRUCT ON THE UNCONTROLLABLE CIRCUMSTANCES AFFIRMATIVE DEFENSE SINCE DEFENDANT FAILED TO ADDUCE FACTS TO SUPPORT THE INSTRUCTION, LET ALONE PROVE THE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

A trial court's refusal to give an affirmative defense instruction due to a failure of evidentiary support is reviewed for an abuse of discretion.[2] ***State v. Lucky***, 128 Wn.2d 727, 731, 912 P.2d (1996) (*overruled on other grounds by* ***State v. Berlin***, 133 Wn.2d 541, 547-9, 947 P.2d 700 (1997)); ***State v. Hunter***, 152 Wn.App. 30, 43, 216 P.3d 421 (2009). Discretion is abused when the decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." ***State v. Enston***, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999); ***State v. Ager***, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Defendants are not entitled instructions unsupported by the evidence as it is error to give them. *Id.*

[2] Defendant cites to ***State v. Fisher***, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) as support for his claim that the refusal to give affirmative defense instructions based on evidentiary failures must be reviewed *de novo*. ***Fisher*** relies on a footnote No. 7 in ***State v. James***, 121 Wn.2d 220, 238, 850 P.2d 495 (1993), which cites ***State v. Walker***, 40 Wn.App 656, 662, 700 P.2d 1168, *reviewed denied*, 104 Wn.2d 1012 (1985). But well established precedent provides instructions refused for factual reasons are reviewed for an abuse of discretion. ***Lucky***, 128 Wn.2d at 731; ***State v. Walker***, 136 Wn.2d 767, 966 P.2d 883 (1998). ***Fisher*** did not overrule this line of cases. One explanation for the discrepancy is ***Fisher*** deals with a self-defense instruction, which is a negating defense touching upon the elements of assault instead of a true affirmative defense like the one at issue. *E.g.* ***State v. Wiebe***, 195 Wn.App 252, 256-7, 377 P.3d 290, *review denied*, 186 Wn.2d 1030, 385 P.3d 122 (2016).

A person commits the crime of bail jumping when:

> having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court [the person] fails to appear[].

RCW 9A.76.170 (1); CP 46 (Inst. 12), 47 (Inst.13), 48 (Inst.14). It is an affirmative defense to bail jumping that:

> uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.170(2). "Uncontrollable circumstances" means:

> An act of nature such as a flood, earthquake or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4).

a. Claims of common car trouble cannot prove the uncontrollable circumstances element of the defense as it does not rise to the level of the substantial barriers to attendance that are designated by the statute.

An explanation as to why defendant's proof failed to support the issuance of an uncontrollable circumstances instruction requires analysis of the excuses contemplated by RCW 9A.76.170 (2)'s affirmative defense. When interrupting the meaning and scope of a statute, a court first looks to

its plain language to determine legislative intent. ***State v. Ervin***, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Courts discern plain meaning from a statute's text, context and related provisions. *Id.*; ***State v. Roggenkamp***, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); ***State v. Keller***, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Under the *ejusden generis* cannon, the scope of a statutory term defined by an illustrative list is limited by the terms contained in the list. ***State v. Larson***, 184 Wn.2d 843, 849, 365 P.3d 740, 743 (2015); ***State v. Gonzales Flores***, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008). Unlisted terms will only be deemed to fall within the scope if similar in kind or comparable to the listed terms. *Id.* Likewise, the *noscitur a sociis* cannon, literally "it is known by its associates," harmonizes meaning among listed terms. ***State v. Jackson***, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999).

RCW 9A.76.010 (4) defines "uncontrollable circumstances" by way of an illustrative list that provides for two distinct categories of significant barriers to appearing in court. The first are comparable to:

> flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment[.]

RCW 9A.76.010(4). This category captures circumstances that the common law referred to as "acts of God", *i.e.*, natural necessities, which could not have been occasioned by the intervention of human agency, but proceed from physical causes alone. *E.g.* ***Grant v. Libby, McNeill & Libby***, 160 Wash. 138, 143, 295 P.139 (1931). The acts of God listed in RCW 9A.76.010 (4) often have catastrophic effects. Floods, earthquakes or fires

can foreseeably create substantial barriers to court attendance by damaging infrastructure and causing mass casualties. Medical conditions requiring hospitalization are alike in that they cause a physiological barrier to court attendance.

Whereas subpart (2)'s second category captures significant barriers caused by incapacitating acts of, or interactions with, third parties:

> An act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4). This provision uses "act of a human being" to describe the third party actor and the affected defendant is the implied person acted upon who has "no time for a complaint to the authorities" or "opportunity to resort to the courts." *Id.* For both terms to be given effect consistent with the cannon against surplusage, this clause must be construed as referring to an interaction between the defendant who would raise the defense and the third party whose act brought about the need. *E.g.*, ***City of New Whatcom v. Roeder***, 22 Wash. 570, 580, 61 P. 767 (1900); ***In re Estate of Mower***, 193 Wn.App. 706, 720, 374 P.3d 180 (2016). The requirement of third party involvement excludes from the defense barriers defendants cause without the involvement of third party actors.

Putting automobile accidents aside for a moment, the significant threats to personal safety described by subpart (2) capture situations where

the person ordered to appear becomes a crime victim. RCW 9A.46.020 (1)(iv) (threat to physical safety), (2)(b)(i) (threat to kill). They also capture scenarios in which one could be legitimately characterized as under duress without recourse to the State's protection. RCW 9A.16.060. Or the kind of external interference with the justice system addressed by the tampering statutes. *E.g.* RCW 9A.72.110, .120, .130. 140, .160; ***Matter of Stroh***, 97 Wn.2d 289, 295, 644 P.2d 1161 (1982). One might envision such threats directed at defendants anticipated to accuse accomplices that would prefer not to be named. *E.g.*, ***People v. Breland***, 83 N.Y.2d 286, 292, 631 N.E.2d 577 (1994) ("decision to eliminate [] confederates as witnesses."); ***State v. Franklin***, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). A limited necessity defense is likewise present in subpart (2), for it contemplates bail jumping to avoid greater evils. *E.g.*, ***State v. White***, 137 Wn.App. 227, 230, 152 P.3d 364, 365 (2007); ***State v. Jeffrey***, 77 Wn.App. 222, 224–25, 889 P.2d 956 (1995); ***State v. Diana***, 24 Wn.App. 908, 914, 604 P.2d 1312 (1979); RCW 9A.16.010(1).

Returning to automobile accidents, which under the statute must involve a third party and foreseeably overlap with the "act of God" category due to their frequent unpredictability and potential to result in the physical barrier of hospitalization. They also create a legal barrier in the form of one's duty to remain at the scene. RCW 46.52.010, .020. Bail jump's affirmative defense avoids the dilemma of forcing people to choose between jumping bail and fleeing an accident scene. Associated with the duty to remain on

scene is the creation of accident reports and the involvement of third parties who could verify the accident's occurrence. This differentiates them from hardships that do not create statutorily recognized barriers to attendance. ***State v. Fredrick***, 123 Wn.App. 347, 353, 97 P.3d 47 (2004) (illness absent hospitalization did not rise to level of uncontrollable circumstances).

All of which accords with the requirement not to read an absurdity into the statute. *See* ***State v. Eaton***, 168 Wn.2d 476, 480, 229 P.3d 704 (2010); ***State v. J.P.***, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); ***State v. Delgado***, 148 Wn.2d 723, 730, 63 P.3d 792 (2003); ***State v. Johnson***, 159 Wn.App. 766, 770, 247 P.3d 11 (2011). The bail jump statute facilitates the operation of bail by deterring those who would otherwise abscond. *E.g.*, WA.Const. Art.1 § 20; CrR 3.2 (a). Without it, absconding would only be punishable as misdemeanor contempt, which would not be a bad bargain for those who see a strategic benefit in delay. RCW 7.21.010(b), (d); RCW 7.21.040(5).

RCW 9A.76.170(3) decreases the allure of absconding to obstruct justice by making that misconduct a seriousness level V Class B felony when the base offense is a Class A; a seriousness level III felony B or C felony when the base offense is a Class B or C felony; and misdemeanor when the base offense is a gross or simple misdemeanor. RCW 9.94A.515; RCW 9A.76.170(3). It should be difficult to imagine an affirmative defense more absurd, which is to say more debilitating to the courts' capacity to enforce orderly administration of justice and conserve the resources wasted

by bail jumping than to excuse it for individually experienced common inconveniences claimed by those who often have selfish reasons for missing a court date, like those who learn the State is temporarily ready to proceed.

Defendant's claim of car trouble, like the common illness addressed in ***Fredrick***, is not comparable to either category of significant barriers that limit the scope of "uncontrollable circumstances." *E.g.* ***Fredrick***, 123 Wn.App. at 353. It is not an act of God, like the events provided for in the statute's first category of excuses. Because it is not caused by the act of a third party, common car trouble falls outside the definition of the statute's second category of excuses. Common car trouble is also distinguisable from automobile accidents in its absence of third-party entanglement, inherent risk of injury or duty to remain at the scene. When vehicle malfunctions do cause injuries warranting hospitalization, the circumstance is covered by the act of God category, so the statute is not under inclusive in that way.

There are no specific terms in subpart (2) capable of being faithfully construed to extend the scope of the excuses contemplated by the statute to claimed inability to secure funds needed for public transportation. If this is a defect in the statute, it is one the Legislature must fix. *See* ***Sedima v. Imrex Co., Inc.***, 473 U.S. 479, 496-500, 105 S. Ct. 3275 (1985); ***Duke v. Boyd***, 133 Wn.2d 80, 87, 942 P.2d 351 (1997); ***Stroh Brewery Co. v. State Dep't of Revenue***, 104 Wn.App. 235, 239-40, 15 P.3d 692 (2001). And it does not manifest in this case as the record shows defendant had the ability and financial means to appear in court. Since the excuse defendant offered is not

one contemplated by the statute, the court correctly found that evidence could not justify issuing an instruction on the affirmative defense.

b. The record suggests defendant created the car trouble that delayed his appearance by failing to maintain it in reckless disregard for his duty to appear.

Subpart (2)'s second element excludes from the affirmative defense those who contribute to the creation of the uncontrollable circumstance in reckless disregard of the requirement to appear. RCW 9A.76.170(2). A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from the conduct a reasonable person would exercise in the same situation. RCW 9A.08.010(1)(c).

The trial court apparently did not refuse the instruction for a failure of this element; however, it can be affirmed on any basis supported by the record. ***State v. Kelley***, 64 Wn.App. 755, 764, 828 P.2d 1106 (1992). And defendant's only testimony on this topic was his conclusory account:

> [I] cannot foresee my radiator blowing up, cracking down, or whatever you want to call it, super steam coming out of the top of it on that morning to where I go around [sic] the block to the light and it's already overheating.

RP 182. This statement about how the alleged radiator trouble manifested did not establish it was reasonably maintained in the days leading up to a court date when defendant knew he was relying on the car for transportation to court. As it turns out, there are a number of signs that typically precede

radiator failure, such as leaks, overheating and the accumulation of sludge. *E.g.*, ***Dufrene v. Imperial Fire & Cas. Ins.***, 866 So. 2d 380, 382, *writ denied*, 874 So. 2d 176 (2004); ER201.[3] Such car trouble is common. Car maintenance is a duty of ownership. ***McCoy v. Courtney***, 25 Wn.2d 956, 965, 172 P.2d 596 (1946). Failure to maintain a car needed for court is a reckless disregard of the known risk that improperly maintained cars might breakdown on the way to court. So defendant's failure to adduce proof of radiator maintenance is another reason the instruction was rightly withheld.

c. The record proved defendant did not appear as soon as the barrier ceased to exist.

For defendant to avail himself of subpart (2)'s affirmative defense he had to establish he appeared or surrendered as soon as the barrier to attendance ceased to exist. RCW 9A.76.170(2); ***State v. O'Brien***, 164 Wn.App. 924, 932, 267 P.3d 422 (2011).

Defendant's failure to appear or surrender as soon as the immediate ordeal of his car allegedly overheating and releasing steam from the radiator passed is another reason the instruction could not have been properly given. The record established he remained at home for 7 days despite living within walking distance of the courthouse, along a major bus route that would have brought him even closer, with money to purchase bus fare and a father to give him a ride. 2RP 197-98, 200-01. Yet, he allegedly chose to:

[3] https://www.yourmechanic.com/article/symptoms-of-a-bad-or-failing-radiator.

> wor[k] on [his car] all day for *seven days* until [he] got picked up on front of [his] house working on [his] vehicle trying to get it fixed so [he] could turn [him]self in and set up a quash.

2RP 187 (emphasis added). In ***O' Brien***, the defendant failed to establish entitlement to the uncontrollable circumstances instruction based on proof he committed new offenses after being released from the incarceration that interfered with a scheduled court appearance. ***O'Brien***, 164 Wn.App. at 927, 931-32. Like ***O'Brien,*** defendant's failure to appear or surrender once the immediate ordeal of his alleged car trouble passed was reason enough to refuse issuing the instruction in his case. Although the trial court did not withhold the instruction for this reason, it supports the ruling so the bail jumping conviction should be affirmed. ***Kelley***, 64 Wn.App. at 764.

d. Refusal to give the instruction was harmless, if error, for defendant's excuse could not prove the defense by a preponderance of the evidence.

An erroneous refusal to instruct on an affirmative defense can be harmless provided it did not contribute to the verdict. *See* ***State v. Brown***, 147 Wn.2d 330, 344, 58 P.3d 889, 896 (2002); ***Neder v. United States***, 527 U.S. 1, 9, 119 S.Ct. 1827 (1999). Defendants must prove the uncontrollable circumstances defense by a preponderance of the evidence. ***O'Brien***, 164 Wn.App at 932.

Had the court issued the requested instruction, defendant's inability to prove the defense by a preponderance of the evidence would have left

him with the same result. This is because his purported car trouble is not comparable to earthquakes, automobile accidents involving third parties or the like. And radiator trouble allegedly capable of being addressed with a "flush kit" designed to flush sludge or debris, rather than fix critical failures of essential components, suggests dilatory maintenance reflecting reckless disregard for his duty to appear. And that he was arrested after remaining within walking distance and a bus trip of the courthouse for 7 days after his car was safely secured, would have kept him from proving he appeared or surrendered as soon as his barriers to appearance ceased. 2RP 187, 197, 200-01. So an error in withholding the instruction would be harmless in this case.

2. A RULING ON COSTS SHOULD AWAIT THE SUBMISSION OF A COST BILL.

Review of appellate costs follows objection to a bill. RAP 14.4-14.5; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000); ***State v. Blank***, 131 Wn.2d 230, 243-44, 930 P.2d 1213 (1997); ***State v. Sinclair***, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016); ***State v. Caver***, 195 Wn.App. 774, 784-86, 381 P.3d 191 (2016). Preemptive challenges to unfiled bills waste space better allocated to the issues presented by a case. *See* ER 201.

D. CONCLUSION.

The court properly declined to issue an instruction on uncontrollable circumstances as it was not supported by the evidence. That ruling was also harmless as the defense could not have been proved, so defendant's bail jumping conviction should be affirmed. This Court should not assess the propriety of awarding costs until a bill is submitted.

RESPECTFULLY SUBMITTED: March 15, 2017.

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